U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JAN 11 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a marketing consulting and management firm. It seeks to employ the beneficiary permanently in the United States as a director of business development and legal consultant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required a master's degree in law and/or business administration or in the alternative, a bachelor's degree with five years of progressive experience. The director further determined that the petitioner submitted evidence to establish that the beneficiary was awarded a dual Bachelor of Law and Bachelor of Business Administration Degree by the [redacted] Israel on May 22, 2003, but that the petitioner failed to demonstrate that the beneficiary meets the experience requirements of the position. The director also determined that the petitioner failed to establish its continuing ability to pay the proffered wage.

On appeal, counsel asserts that the beneficiary meets the minimum experience required for the position and that the petitioner has the continuing ability to pay the beneficiary's proffered wage.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner has submitted evidence to show that the beneficiary possesses a dual Bachelor of Law and Bachelor of Business Administration Degree. The petitioner has also submitted employment letters pertaining to the beneficiary's work experience. The first issue in this case is whether the beneficiary's degree and work experience constitute a U.S. advanced degree or a foreign degree equivalent and meet the requirements of the labor certification.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and

whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

In this matter, Part H, line 4, of the labor certification reflects that a master's degree in law and/or business administration is the minimum level of education required. Line 8 reflects that an alternative combination of education and experience is acceptable. Line 8-A and 8-C reflect that a bachelor's degree and five years of progressive experience is the alternative combination of education and experience that is acceptable. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. As it appears the beneficiary has earned the foreign equivalent of the requisite degree, on May 22, 2003, on the section of the labor certification eliciting information of the beneficiary's five years of work experience in the job offered, he represented the following:

- That he was employed by the petitioner since January 28, 2008 in the job offered.
- That he was employed by [redacted] as a director of business development and legal consultant from February 6, 2006 to December 21, 2007. The beneficiary described his job duties.
- That he was employed by [redacted] as a legal consult/business development director from October 1, 2004 to February 3, 2006. The beneficiary described his job duties.
- That he was employed full-time (40 hours per week) by [redacted] as a legal consultant (Articled Clerk) from January 1, 2002 to December 31, 2003.

The petitioner submitted the following employment letters:

- A letter dated July 26, 2010 from Law Offices who stated that the law office employed the beneficiary as a legal consultant (Articled Clerk) from January 2002 to December 2003. The declarant described the beneficiary's job responsibilities to include "specialized in civil litigation, real estate, reconstructions and joint ventures; responsible for contract and commercial fraud disputes and litigation, including litigation involving asset purchase, stock purchase agreements, service and sales contracts, partnership and shareholder agreements and insurance and reinsurance contracts; securities fraud and broker-customer litigation and arbitration trade secret, unfair competition and employment agreement litigation and injunction proceedings; commercial real estate disputes, including non-payment proceeding; participated in bankruptcy cases, corporate reconstructions, joint ventures and mergers and acquisitions; attended conferences and drafted opinion letters and analytical advisory reports in connection with civil proceedings and strategies, in particular offering plans and real estate matters. Mr. also served as a personal assistant to Advocated Eyal Rozovsky, a senior partner."

- A letter dated September 29, 2010 from the senior project manager of who stated that the company employed the beneficiary from February 6, 2006 to December 21, 2007 as a director of business development and legal consultant. The declarant described the beneficiary's job duties.

- A letter dated August 16, 2010 from who stated that the company employed the beneficiary as a legal consultant/business development director from October 1, 2004 to February 3, 2006. The declarant described the beneficiary's job duties.

The petitioner submitted the following employment letters in response to the director's Notice of Intent to Deny:

- A letter December 22, 2010 from , partner of who stated that the office employed the beneficiary as a personal assistant to one of the senior partners at the company from January 1, 2002 to May 22, 2003, and that from May 23, 2003 to December 31, 2003 the beneficiary was employed as a legal consultant (Articled Clerk). The declarant described the beneficiary's job duties in his capacity as a legal consultant.

- A certification from the vice president of operation of , who stated that the company employed the beneficiary as a business development associate director/legal consultant from June 1, 2003 to December 31, 2004. The declarant described the beneficiary's job duties.

The information provided in the employment statements contradict each other and conflict with the beneficiary's statements on the ETA Form 9089. Contrary to the declarant's statements, the beneficiary did not list as a former employer on the ETA Form 9089 or on the Form G-325A. Furthermore, the claimed experience with from June 1, 2003 to December 31, 2004 would overlap with other full-time work experience previously claimed. The experience with allegedly ended in December 2003 and the experience with in New York allegedly began in October 2004, three months before the experience in Israel supposedly ended. There has been no plausible explanation given for this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept these letters as persuasive evidence of the beneficiary's employment. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Furthermore, in the letter dated July 26, 2010, the representative of stated that the law office employed the beneficiary as a legal consultant (Articled Clerk) from January 2002 to December 2003. However, on appeal, the petitioner submitted a letter from the same declarant dated December 22, 2010 in which he stated that the law office employed the beneficiary a personal assistant to one of the senior partners from January 1, 2002 to May 22, 2003, and as a legal consultant (Atricled Clerk) from May 23, 2003 to December 31, 2003. The job duties, job titles, and periods of time during which he held certain positions change from one letter to the next in addition to overlapping with the employment. Again, there has been no explanation given for these inconsistencies which undermines the credibility of the evidence as a whole. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Because of these unexplained inconsistencies, the AAO does not accept the employment statements as evidence of the beneficiary's five years of progressive employment experience. Neither the work experience nor the nature of the employment can be confirmed.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is August 19, 2008. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. There has been no plausible explanation given for the multiple inconsistencies and contradictions found in the record pertaining to the beneficiary's alleged employment.

Accordingly, it has not been established that the beneficiary has the requisite 5 years of progressive post-baccalaureate experience or that he is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

The second issue in the case is whether the petitioner has established its ability to pay the proffered wage since the priority date of August 19, 2008. The evidence in the record of proceeding shows that the petitioner is a limited liability company (LLC).[1] On the ETA Form 9089, the beneficiary claims to have been employed by the petitioner since January 28, 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is $150,000.00. Although the beneficiary claims to have been employed by the petitioner since January 28, 2008, the petitioner did not provide any evidence of wages paid to him.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009): *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu*

[1] An LLC is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

*Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's Forms 1065[2] federal income tax returns stated its net income as detailed below:

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[2] For an LLC, filing as a partnership, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC has income, credits, deductions or other adjustments

- In 2008, the Form 1065 stated net income of $530,999.00.
- In 2009, the Form 1065 stated net income of -$340,908.00.

Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage in 2009 through its net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3]

An LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If the total of an LLC's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets as shown in the table below.

- In 2009, the Form 1065 stated net current assets of -$372,961.00.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that it has the ability to pay the proffered wage. Counsel further asserts that USCIS must consider the totality of the circumstances in its determination of the petitioner's ability to pay the proffered wage.

Counsel asserts that USCIS should add back depreciation to the petitioner's net income. However, as noted above, both USCIS and the federal courts have concluded that adding back depreciation to net income overstates the petitioner's ability to pay the proffered wage. Depreciation is a real expense. *See, e.g., River Street Donuts, LLC.*

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from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel submitted the petitioner's unaudited financial statements for 2008, 2009, and 2010. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. It appears that the statements were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The petitioner submitted copies of its bank statements for 2010 and infers that the account balances should be taken into consideration in determining its ability to pay the proffered wage. Reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel further urges that the beneficiary's employment will result in reduced professional fees. Counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[4] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a director of business development and legal consultant will significantly increase the petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Generally, wages paid to other employees cannot be considered in determining the petitioner's ability to pay the proffered wage to the beneficiary.

Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that it paid wages in excess of the proffered wage is insufficient.

Counsel asserts on appeal that the petitioner was affected by the economic recession in 2009, and that the recession has temporarily worsened the petitioner's financial situation and has disrupted its regular business. A broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the economic recession does not by itself demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events noted above. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I & N Dec. 533(BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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[4] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

Counsel suggests that USCIS should consider the petitioner's past business transactions such as the purchase of new fixed assets, its newest venture, and its anticipated business growth and increased profits in assessing the petitioner's ability to pay the proffered wage. While the petitioner may anticipate business growth and increased profits in the future, it still must show that it had such capacity beginning on the priority date, August 19, 2008. It is not realistic that the petitioner could have paid the proffered wage to the beneficiary, assessing the totality of the circumstances.

On appeal, counsel infers that when taken into consideration, other sources of income such as officers' compensation amounts can be funds made available to pay the proffered wage. However, there is no statement in the record or other documentation such as the owner's personal income tax returns to indicate that the petitioner's owners would be willing and able to forego the amount of officer compensation needed to cover the proffered wage during 2009 and after, if the petitioner is not able to do so out of its own funds. Thus, the petitioner has not demonstrated that the shareholder would have been willing and truly able to forego officer compensation during 2009 while still covering his own household expenses. Going on record without adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee as is stated here or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has

not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not submitted sufficient evidence to establish that 2009 was an uncharacteristically unprofitable year or difficult period for its business. The petitioner has not submitted evidence establishing its business reputation. The petitioner has failed to demonstrate that the beneficiary meets the experience requirements of the position. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. The job offer in this case does not appear realistic.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.